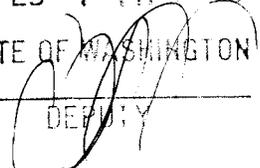


FILED
COURT OF APPEALS
DIVISION II

NO. 40792-2-II

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STATE OF WASHINGTON
BY 
DEPUTY

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

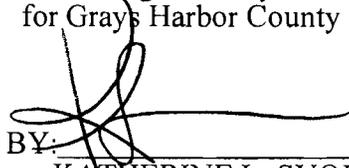
SCOTT A. GUELLER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFFEE
Prosecuting Attorney
for Gray's Harbor County

BY: 
KATHERINE L. SVOBODA
Senior Deputy Prosecuting Attorney
WSBA # 34097

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STATEMENT OF THE CASE

Factual History¹

During the investigation of the bad check the written by the appellant, the subject of count one, Detective Matt Organ became aware of some suspicious activity taking place in the appellant's account at Sterling Saving Bank. The bank had referred Gueller's case to their fraud department. The fraud investigator found that the appellant had made a series of large deposits that matched large withdrawals from another customer of the bank. The other customer was contacted and it was learned that the appellant had convinced the customer to let him make investments on the other customer's behalf. This violated the bank's rules and regulations and the account was closed.

On March 31, 2008, the sheriff's office received the suspicious activity reports (SARs) from Sterling Savings Bank concerning the appellant's activity. It was learned that the customer who had transferred her children's Uniform Transfer to Minors (UTMA) accounts from Charles Schwab to her Sterling Savings account and then to the appellant was Yvonne Kooyman. Kooyman transferred a total of \$90,000 to the appellant. The transfer was in the amount of \$30,000 on July 6, 2007. The appellant deposited \$28,000 in cash that day with \$22,000 of this money wired to his personal Ameritrade account on the same day. The

¹

This section is taken from the Motion and Declaration filed in support of the original warrant in this case. CP at 20-24.

appellant had the bank write two additional checks to other parties for a total of \$5,000. It was determined the source of the appellant's money was a \$30,000 check from Kooyman.

A second transfer from Kooyman's children's Charles Schwab UTMA accounts to her Sterling Saving Bank account occurred on July 23, 2007. Kooyman received two wires for \$35,000 each for a total of \$70,000. Kooyman wrote a check for \$60,000. That day Gueller deposited \$58,000 in cash to his Sterling Saving account and wired \$50,000 of that money to his personal Ameritrade account.

On April 15, 2008, Kooyman was contacted, and Detective Organ learned that she had been married to William Harper in February of 2008. She now uses the surname of Harper. For clarity this narrative will continue to refer to her as Kooyman. Kooyman stated she met the appellant when she bought a car from him at Whitney's in Montesano. She then said that he "stole \$90,000 from me." Kooyman stated she had given the appellant checks for \$30,000 and \$60,000 in the summer of 2007 about two weeks apart. Kooyman stated the appellant had promised to double her money in about a year and a half. The appellant told her he would invest all of the money she gave him in an Ameritrade account for her three children. Kooyman stated the appellant was not going to be paid anything for helping her, and the source of her money was from her grandfather who had set up the accounts with Charles Schwab for the three children as a college fund. Kooyman stated she had received less than

\$2,000 back from the appellant, and he admitted that he had lost all of her money because of a “market down turn.”

Kooyman’s husband, Harper, was also interviewed. Harper stated that he and Kooyman were shopping for a vehicle when they met the appellant for the first time in June of 2007. The appellant was a sales person they dealt with and during the transaction they explained that Kooyman had stocks and that was how they were going to pay for the vehicle. During their meeting the appellant told Harper that if he gave him \$10,000 he would double their money. The appellant stated that he would match whatever Harper put in. Harper said the appellant never told him how long it would take to double their investment. About a week later when Harper contacted the appellant to see how the search for a vehicle was going, the appellant said he had not found exactly what they were looking for, but he asked Harper at that point for \$30,000 to invest for Harper and Kooyman. The appellant stated that the more money Harper and Kooyman invested, the more they would make because they could buy better stock. Harper said about a week later he and Kooyman took a \$30,000 check to Gueller to invest. The appellant told them he would cash the check and invest the money for them the following day. The appellant said he would come to their house and show them where he invested the money, but he never showed up.

When Kooyman and Harper demanded the money back from Gueller in November of 2007 he finally admitted that he had made bad

choices and lost the money. The appellant told them he did not know how to tell them when it happened because he knew that it was their kids' money. Although the appellant set up an Ameritrade account in Kooyman's name no deposits were ever made to that account and all funds transferred from Kooyman to the appellant were placed in the appellant's personal account.

Procedural History

The appellant was charged by Amended Information on October 19, 2009 in count one of Unlawful Issuance of Bank Checks (not at issue in this appeal) and in count two of Unlawful Offer, Sale or Purchase of Securities. CP at 1-2. The State further alleged that count two "was a major economic offense or series of offenses as defined by RCW 9.94A.535(3)(d)(i-ii)" and gave notice that "[u]pon the appellant's conviction...and admission of the appellant of such aggravating circumstances, the State will be asking for an exceptional sentence." CP at 1-2.

The appellant plead guilty as charged to this Amended Information on October 19, 2009. CP at 25-33. The appellant signed a plea of guilty form in compliance with CrR 4.2(g). *Id.* The appellant acknowledged with his initials that he had been advised of the elements of the crime in Section 4, and that "[t]he elements are set forth in the Amended Information on file herein and incorporated by this reference." *Id.*

In section 11, the appellant states in his own words what he did that makes him guilty of count two:

2. On July 2, 2007 to July 30, 2007, I borrowed money with the intent of “day-trading” securities in connection with the offer, sale, or purchase of any security and indirectly did willfully engage in a practice which would operate as a fraud or deceit upon any person. I further agree that this is a major economic offense.

Id.

In addition to the written plea agreement, the court engaged in a colloquy on the record with the appellant.

The Court: Please state your name.

The defendant: Scott Gueller

The Court: And I take it that you read and write well?

The defendant: Yes, sir, I do.

The Court: Did you carefully read this plea agreement?

The defendant: Yes, I did.

The Court: Did you understand everything in it?

The defendant: Yes, Your Honor.

The Court: And you discussed it with your attorney?

The defendant: I did, sir.

...

The Court: All right. And did you carefully read the statement of defendant on plea of guilty?

The defendant: I did, Your Honor.

The Court: And did you understand everything in the statement?

The defendant: Yes, sir.

The Court: And you discussed it with your attorney?

The defendant: Yes, sir.

The Court: Do you have any questions of me regarding the statement?

The defendant: No, sir.

The Court: Did you pay close attention to your constitutional rights on the bottom of the front page and going on to the top of the second page?

The defendant: Yes, Your Honor, I did.

The Court: Did you understand those rights and the fact that you give up those rights when you plead guilty?

The defendant: Yes, sir.

...

The Court: And how do you plead to Count 2 in the amended information, unlawful offer, sale or purchase of securities?

The defendant: Guilty, Your Honor.

The Court: Did you on or about or between July 1st, the 2007 and July 30th, 2007 in Grays Harbor County, Washington in connection with the offer, sale or purchase of any security, directly or indirectly, number one, did willfully employ any device, scheme or artifice to defraud and/or two, willfully make any untrue statement of a material fact or to [omit] to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not mislead – not misleading; is that correct?

Mr Kupka: I believe that's what the statute says, Judge.

The Court: Okay. And/or three, did willfully engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person?

The defendant: Yes, Your Honor.

...

The Court: ...And do you also admit to the aggravating circumstances as alleged in the amended information that the current offense was a major economic offense and/or a series of offenses as defined in RCW 9.94a.535 subsection (3)(d)(i-ii)?

The defendant: Yes, sir.

10/19/09 RP at 4, 6-9

The sentencing was continued in order to give the appellant a chance to work and pay towards restitution. 10/19/09 RP at 10. The appellant was sentenced on April 26, 2010 and no monies had been paid. 4/26/10 RP at 13, 14 and 15. The court sentenced the appellant to an exceptional sentence of 120 months on count two, to run consecutive to count one. CP at 3-12. On May 28, 2010, the court entered findings and conclusions in support of the exceptional sentence. CP at 15-17.

ARGUMENT

The Appellant's Guilty Plea Was Entered Knowingly, Intelligently and Voluntarily.

Due process requires that a defendant's guilty plea be made knowingly, voluntarily, and intelligently. *In re Pers. Restraint of Isadore*, 151 Wash.2d 294, 297, 88 P.3d 390 (2004). In addition to these constitutional requirements, CrR 4.2 precludes a trial court from accepting a guilty plea without first determining that the defendant is entering the plea voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea. *State v. Ross*, 129 Wash.2d 279, 284, 916 P.2d 405 (1996), CrR 4.2(d) "The court shall not accept a plea of guilty, without first determining that it is made voluntarily,

competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.” CrR 4.2(d).

When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith* 134 Wash.2d 849, 852-853, 953 P.2d 810, 811 (1998) citing *State v. Perez*, 33 Wash.App. 258, 261, 654 P.2d 708 (1982).

In this case, the appellant’s attorney went through the plea form with him, and the appellant acknowledged to the court that he understood the document. 10/19/09 RP at 6. After the colloquy, the court did not err in finding the appellant’s plea to be made knowingly, intelligently and voluntarily. 10/19/09 RP at 9-10. The appellant offers no credible evidence to rebut the presumption that his plea was voluntary.

The Appellant Understood the Law, the Facts, and the Relationship Between the Two.

The United States Supreme Court has said that one purpose of Fed.R.Crim.P. 11, upon which Washington’s CrR 4.2 is based, is to fulfill the constitutional requirement that a plea of guilty be made voluntarily. *State v. Keene*, 95 Wash.2d 203, 206, 622 P.2d 360 (1981); *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

In looking at the defendant's understanding of how the law and the facts of a particular case relate, the *Keene* court presented the following: "that the conduct which the defendant admits constitutes the offense charged in the indictment or information..." Requiring this examination protects a defendant "who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *State v. Keene*, 95 Wash.2d at 209; *McCarthy v. United States*, 394 U.S. at 467, 90 S.Ct. at 1171 (quoting Fed.R.Crim.P. 11, Notes of Advisory Committee on Criminal Rules).

The appellant relies, in part, on *State v. S.M.*, in which the court found that "the record does not show that S.M. understood the law in relation to the facts." *State v. S.M.*, 100 Wash.App. 401, 415, 996 P.2d 1111 (2000). However, this case can be distinguished from the case at bar.

When he was approximately 14 years old, S.M. was charged with three counts of rape of a child in the first degree. These charges were based on incidents of sexual intercourse that occurred when S.M. was 12 years old with a brother that was 9 years old at the time. *State v. S.M.* 100 Wash.App. at 403.

S.M. pleaded guilty to these charges, and S.M.'s guilty plea stated that "...I had sexual contact with my Brother..." *State v. S.M.* at 403. The court "asked trial counsel a few brief questions about the ages of the victim and the defendant when the charges occurred, the court read the

charges. *Id.* The judge also asked S.M. if he knew “what the word sexual intercourse means” and S.M. stated that he did. *Id.*

As part of his motion to withdraw his guilty plea, S.M. stated that his attorney was not present when he signed the plea form and that no one had reviewed the plea form with him and discussed other options. *Id.* at 404. The court found that under these circumstances, there was no “indication that S.M. understood that the crime of rape of a child required penetration.” *Id.* at 415.

In this case, the appellant claims that the record developed “does not establish sufficient facts and does not show Mr. Gueller’s understanding of the relationship between the facts and the law...” Appellant’s Brief at 7. The appellant states that “[b]orrowing money with the intent to ‘day trade’ securities is not, by itself, a violation of RCW 21.20.010” and that “[n]either the plea form nor the colloquy outlines any particular conduct on Mr. Gueller’s part that could be described as an ‘act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.’” Appellant’s Brief at 7.

However, unlike the under-represented juvenile respondent in *State v. S.M.*, the appellant is an adult who was aided by competent counsel in his review of the plea agreement and the statement on plea of guilty. 10/19/10 RP at 4, 6. The appellant does not point to anything that indicates a confusion regarding how his actions relate to the criminal conduct charged.

In *State v. S.M.*, the term “sexual intercourse” was not used in the guilty plea. Instead, the respondent stated that he had “sexual contact” with the victim, which would not constitute rape of a child in the first degree. *State v. S.M.* at 403; RCW 9A.44.073; RCW 9A.44.010(1) and (2). Further, the court did not clarify that the juvenile actually understood that intercourse required actual penetration rather than just contact. *State v. S.M.* at 403.

The defendant acknowledged that he understood the elements as presented in the Amended Information on his guilty plea form. CP at 25-33. As the court went through the elements, there is nothing ambiguous about what was alleged in relation to what the defendant admitted doing. The defendant admitted that his borrowing of money “with the intent of ‘day-trading’ securities in connection with the offer, sale, or purchase of any security and indirectly did willfully engage in a practice which would operate as a fraud or deceit upon any person” and further agreed that it was a major economic offense. CP at 25-33.

On its face, the defendant’s statement meets the elements of the crime. Further, the amended information references the RCW which presents what constitutes a “major economic offense.” CP at 25-33. Again, there is no ambiguity when looking at the plea form, the amended information and the statute together.

The appellant seems to claim that the court must elicit very specific facts to support each element. However, the Court in *State v. S.M.* does

not seem to be seeking such a statement. The Court's concern was that S.M.'s statement did not evidence an understanding that rape of a child required penetration rather than being concerned that S.M. didn't say that he inserted something into his brother's anus. It seems that a statement from S.M. that he had penetrated his brother would have been sufficient to show his understanding.

The waiver of jury trial was proper in this case.

Criminal defendants enjoy a state constitutional right to a jury trial. Wash. Const. Art. 1, sec. 21; *State v. Stegall*, 124 Wash.2d 719, 728, 881 P.2d 979 (1994). Waiver may be made only by a knowing, intelligent, and voluntary act, and is valid only upon a showing of either defendant's personal expression or an indication the court or defense counsel has discussed the issue with the defendant before the attorney's own waiver. *Stegall*, 124 Wash.2d at 724-25, 729, 881 P.2d 979. Absent an adequate record to the contrary, courts must presume a valid waiver did not occur. *State v. Wicke*, 91 Wash.2d 638, 645, 591 P.2d 452 (1979). Both the right to a jury, as well as the right to a 12-person jury, are protected by article 1, section 21 of the state constitution. *State v. Stegall*, supra.

Washington courts have long recognized the validity of jury waivers where the trial court did not advise the defendant that he or she had the right to participate in jury selection, that the jury must be impartial, and that the jury would presume the defendant innocent until that presumption is overcome. In *State v. Brand*, the reviewing court upheld

the jury waiver as valid where the colloquy only generically addressed waiving the right to a jury. *State v. Brand*, 55 Wash.App. 780, 780 P.2d 894 (1989), review denied 114 Wash.2d 1002, 788 P.2d 1077, grant of post-conviction relief reversed 65 Wash.App. 166, 828 P.2d 1, review granted 119 Wash.2d 1013, 833 P.2d 1390, reversed 120 Wash.2d 365, 842 P.2d 470, reconsideration denied. There was no mention of the number of jurors, that they would have to agree on a verdict, or that the defendant would be able to participate in jury selection. *Id.* at 789-90.

Similarly, in *State v. Valdobinos*, the court upheld the validity of the jury waiver where the colloquy consisted of the court asking whether the defendant understood he was “giving up [the] right to a jury trial,” conferring with counsel, then acknowledging that he was giving up this right. *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993). There was no mention even of the number of jurors vis-à-vis the judge, or that the jurors would all have to agree on the verdict. *Id.* at 287-8.

In *State v. Lund*, the court's colloquy only advised the defendant that he was giving up the right to have 12 persons hear his case, rather than one judge. *State v. Lund*, 63 Wash.App. 553, 821 P.2d 508, review denied 118 Wash.2d 1028, 828 P.2d 563 (1991). Although the trial judge mentioned the process of jury selection, there was no mention of the defendant's participation therein. Indeed, the trial judge indicated that the defendant's attorney and the State's attorney would select the jury. The defendant indicated that he had an opportunity to discuss the issue with

counsel, and a written waiver was filed. The reviewing court found this colloquy sufficient. *Id.* at 556-559.

As the foregoing authority establishes, Washington courts have long recognized that the right to a trial by jury can be waived, and there is no particular “laundry list” of rights into which the trial court must inquire. Indeed, the list of rights the defendant asserts must be acknowledged has specifically been rejected in *State v. Pierce*.

The Court’s ruling in *State v. Pierce* controls in this case. *State v. Pierce*, 134 Wn.App. 763, 142 P.3d 610 (2006). The defendant makes a brief argument that “[b]ecause *Pierce* fails to outline any test for determining the validity of a state constitutional right, it should be reconsidered.” Appellants Brief at 20, footnote 7. However, the defendant offers no authority or analysis to support this assertion and it should be disregarded.

The *Pierce* court held that:

A written waiver, as CrR 6.1(a) requires, is not determinative but is strong evidence that the defendant validly waived the jury trial right. *State v. Woo Won Choi*, 55 Wash.App. 895, 904, 781 P.2d 505. An attorney's representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *Woo Won Choi*, 55 Wash.App. at 904, 781 P.2d 505. Courts have not required an extended colloquy on the record. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979; *State v. Brand*, 55 Wash.App. 780, 785, 780 P.2d 894 (1989). Instead, Washington requires only a personal expression of waiver from the defendant. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979.

State v. Pierce, 134 Wash.App. 763, 771, 142 P.3d 610, 613 - 614 (2006).

The case at bar do not involve the appellant's decision to waive a jury in favor of a bench trial. However, by analogy the same analysis must be applied to a waiver of jury when a defendant chooses to plead guilty. Here, the appellant was properly advised and had the advice of counsel when making his decision to proceed.

The Court Properly Exercised Its Discretion In Imposing Exceptional Sentence.

When reviewing an exceptional sentence, the Court asks “(1) whether there is sufficient evidence in the record to support the reasons for imposing an exceptional sentence under a clearly erroneous standard, (2) whether as a matter of law the reasons justify an exceptional sentence, and (3) whether an exceptional sentence is clearly excessive under an abuse of discretion standard.” *State v. Garnica*, 105 Wash.App. 762, 768, 20 P.3d 1069, 1072 (2001); *See State v. Halgren*, 137 Wash.2d 340, 345-46, 971 P.2d 512 (citing RCW 9.94A.210(4)); *State v. Nordby*, 106 Wash.2d 514, 723 P.2d 1117 (1986)).

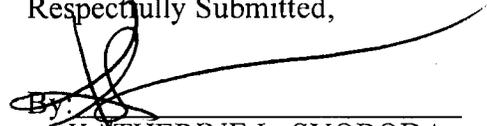
In its Findings and Conclusions supporting and exceptional sentence, the court found that the defendant's admission of a major economic offense was a substantial and compelling reason to impose an exceptional sentence. CP at 15-17. The court found that a sentence at the statutory maximum was appropriate considering the facts of the case and the injury suffered by the children who had their trust funds stolen and squandered. 4/26/10 RP at 16; CP at 20-24, 41-47.

CONCLUSION

The defendant's appeal should be denied and the trial court conviction and sentence affirmed.

DATED this 3rd day of January, 2011.

Respectfully Submitted,



By: _____
KATHERINE L. SVOBODA
Senior Deputy Prosecuting Attorney
WSBA # 34097

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COURT OF APPEALS
DIVISION II

11 FEB -1 PM 1:08

STATE OF WASHINGTON
BY _____

DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

No.: 40792-2-II

v.

DECLARATION OF MAILING

SCOTT A. GUELLER,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 31ST day of January, 2011, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; P.O. Box 6490, Olympia, WA 98501 and to Scott A. Gueller, DOC #906463, Coyote Ridge Corrections Center, P. O. Box 769, Connell, WA 99326 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman